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4 RONALD SINGH,
5 Plaintiff,
6 v.
7 WILLIAM P. BARR, et al.,
8 Defendants.
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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN JOSE DIVISION
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19 Case No. 20-cv-02346-VKD
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28 **ORDER GRANTING IN PART
PETITIONER'S MOTION FOR
TEMPORARY RESTRAINING ORDER**

Re: Dkt. No. 2

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14 Petitioner Ronald Singh is a citizen of Fiji who was detained by U.S. Immigration and
15 Customs Enforcement (“ICE”) on July 6, 2018 and remains in custody at the Mesa Verde ICE
16 Processing Facility (“Mesa Verde”) in Kern County, California.¹ He filed the present action for
17 habeas corpus relief, claiming that he is being detained under circumstances that violate his due
18 process rights under the Fifth Amendment of the U.S. Constitution. Pursuant to 28 U.S.C. § 2241,
19 he seeks an order of release from detention, with appropriate conditions of supervision if
20 necessary. Dkt. No. 1.

21 Presently before the Court is Mr. Singh’s motion for a temporary restraining order
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28 ¹ In these proceedings, Mr. Singh has been detained at Mesa Verde and at the Federal Detention
Center in Honolulu, Hawaii (“FDC Honolulu”). Respondents note that venue generally is proper
in the jurisdiction in which an alien is detained. Nevertheless, they do not dispute that this action
properly is before this Court insofar as Mr. Singh is detained under the authority of the San
Francisco, California Field Office Director. Additionally, they note that to the extent Mr. Singh
challenges the March 2, 2020 denial of his request for release on bond, he was arrested and placed
in detention by the San Francisco Field Office of ICE Enforcement & Removal Operations. *See*
Landeros Jimenez v. Wolf, No. 19-cv-07996-NC, 2020 WL 510347, at *2 (N.D. Cal. Jan. 30,
2020) (concluding that venue is proper in the Northern District of California where at least one of
the respondent officers resides in this district, the petitioner alleged he was placed in detention by
the San Francisco Field Office of ICE Enforcement & Removal Operations, and his immigration
proceedings occurred in San Francisco.)

1 (“TRO”), requesting immediate release, pending the Court’s review and determination of his
2 habeas petition. The parties have fully briefed the matter, including supplemental papers filed
3 with leave of court. Dkt. Nos. 2-3, 12-14, 17-18, 22. The matter is deemed submitted for
4 determination without oral argument. Civ. L.R. 7-1(b); *see also* Dkt. No. 11. For the reasons
5 discussed below, the motion is granted in part.²

6 **I. BACKGROUND**

7 **A. Mr. Singh**

8 Born in Fiji in 1988, Mr. Singh entered the United States in 1989 with his parents when he
9 was an infant. He was admitted to the United States as a refugee and subsequently was granted
10 asylum in August 2005. Dkt. No. 1-6 at 10, 17, 20³; Dkt. No. 1-8. His parents have obtained
11 lawful permanent resident status, and Mr. Singh has a younger sister who is a United States citizen
12 by birth. He says that he has never returned to Fiji and has no family there, and the record
13 indicates that for the most part he has lived with his family in Sacramento, California. Dkt. No. 1-
14 6 at 10.

15 Mr. Singh has a criminal record and has been arrested four times. In 2011, he was arrested
16 for carrying a concealed weapon, carrying a loaded firearm in a public place, and driving under the
17 influence (“DUI”). In 2012, while those charges were pending, Mr. Singh was arrested on charges
18 of possession of a dirk or dagger. On November 20, 2012, he was convicted of charges resulting
19 from both arrests. Dkt. No. 1-7 at 30-36; Dkt. No. 12-2 ¶¶ 6-10.

20 In 2013, while on probation for the two prior convictions, Mr. Singh was arrested on
21 charges of armed robbery in violation of California Penal Code § 211, and battery resulting in the
22 infliction of serious bodily injury in violation of California Penal Code § 243(d). Dkt. No. 1-6 at
23 12-13; Dkt. No. 1-7 at 16; Dkt. No. 12-2 ¶¶ 11-12. Mr. Singh pled “no contest” to the robbery
24 charge under Cal. Penal Code § 211, and was sentenced to six years of imprisonment, which was

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26 ² All parties have expressly consented that all proceedings in this matter may be heard and finally
27 adjudicated by a magistrate judge. 28 U.S.C. § 636(c); Fed. R. Civ. P. 73; Dkt. Nos. 7, 10.

28 ³ All pin citations to documents filed in this docket are to the ECF page number that appears in the
header of the cited document.

1 suspended for time served (364 days), and five years of probation. Dkt. No. 1-6 at 43; Dkt. No.
2 12-2 ¶ 12.

3 In 2015, Mr. Singh violated his probation and was arrested on charges of unlawful taking
4 or driving of a vehicle under California Vehicle Code § 10851(a), receiving a stolen vehicle
5 knowing that it was stolen under California Penal Code § 496d(a), and misdemeanor possession of
6 narcotics paraphernalia under California Health & Safety Code § 11364. Dkt. No. 1-6 at 13; Dkt.
7 No. 1-7 at 8-10; Dkt. No. 12-2 ¶¶ 14-15. In October 2015, Mr. Singh admitted violating his
8 probation on the prior robbery conviction and pled no contest to the charge under California
9 Vehicle Code § 10851(a). His probation was revoked, and he was sentenced to three years on the
10 Vehicle Code § 10851 charge and to six years on the robbery conviction, with the sentences to run
11 concurrently. Dkt. No. 1-6 at 13; Dkt. No. 12-2 ¶ 16.

12 Mr. Singh says that he served his sentence and was scheduled to be released on parole,
13 when he was detained by ICE on July 6, 2018. Dkt. No. 1 ¶ 30; Dkt. No. 1-6 at 13. He was
14 charged with removability under the Immigration and Nationality Act (“INA”) as an alien
15 convicted of an aggravated felony (Dkt. No. 1-8; Dkt. No. 12-2 ¶ 17). *See* INA
16 § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii).

17 **B. Immigration Proceedings**

18 Mr. Singh sought relief from removal. After several preliminary hearings, the immigration
19 judge (“IJ”) held an evidentiary hearing on February 25, 2019.⁴ Dkt. Nos. 1-9, 1-10. On March 5,
20 2019, the IJ issued a written decision denying Mr. Singh’s applications for relief and ordering him
21 removed to Fiji. Dkt. No. 1-11 at 12-22.

22 Mr. Singh appealed the IJ’s decision to the Board of Immigration Appeals (“BIA”), which
23 dismissed his appeal in a decision dated August 5, 2019. Dkt. No. 1-11 at 26-30. On August 30,
24 2019, Mr. Singh petitioned the Ninth Circuit for review. *Id.* at 32. On January 24, 2020, the
25 Ninth Circuit denied the government’s motion to dismiss and for summary judgment, and granted
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27 _____
28 ⁴ Although each side blames the other for delays in the underlying proceedings, the record
indicates that at least some delays are attributable to both sides. Dkt. No. 1 ¶ 30; Dkt. No. 12 at
20-21.

1 Mr. Singh a stay of removal, pending review of his petition. Dkt. No. 1-6 at 76-77. That matter
2 remains pending before the Ninth Circuit, and the record indicates that Mr. Singh's petition for
3 review is not yet fully briefed. *See id.*; *see also* Dkt. No. 12 at 5.

4 On January 10, 2020, Mr. Singh requested a bond hearing with the Immigration Court,
5 pursuant to *Casas-Castrillon v. Holder*, 535 F.3d 942 (9th Cir. 2008). Dkt. No. 1-11 at 2-11. On
6 February 10, 2020, after holding a hearing, the IJ concluded that she lacked jurisdiction to grant
7 Mr. Singh's request for bond, finding that *Casas-Castrillon* is no longer good law in view of
8 *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). In the alternative, the IJ found that the Department
9 of Homeland Security ("DHS") met its burden to establish that Mr. Singh is a danger to the
10 community. Dkt. Nos. 1-14, 1-15, 1-17.

11 Mr. Singh appealed the denial of bond to the BIA. Dkt. No. 1-16. That appeal remains
12 pending. According to Mr. Singh, briefing on his appeal is due April 20, 2020, and the BIA
13 typically takes 2-4 months to issue a decision after briefing. *See* Dkt. No. 1-18 ¶ 8.

14 C. COVID-19 Pandemic

15 The world currently is in the midst of a global pandemic due to the novel coronavirus,
16 COVID-19. The gravity of the pandemic, as well as the severity of the disease and the ease of its
17 transmission, have been well-documented, including in the findings of a number of courts within
18 this District. As noted by one court:

19 In a very short period of time, and particularly in the past month,
20 COVID-19 has brought dramatic changes to the country, including
21 the State of California's issuance of an order directing all persons
22 living in the state to "stay home" and to "at all times practice social
23 distancing." *See* Cal. Executive Order N-33-20. The Centers for
24 Disease Control and Prevention ("CDC") likewise has advised all
25 person[s] to "stay home as much as possible," to "take everyday
26 precautions to keep space between yourself and others," and to
27 "avoid crowds as much as possible," noting that the "risk of
28 exposure . . . may increase in crowded, closed-in settings with little
air circulation." *See* www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/get-ready.html.

26 *Ortuno v. Jennings*, No. 20-cv-02064-MMC, 2020 WL 1701724, at *1 (N.D. Cal. Apr. 8, 2020).

27 Additionally, as noted by another court within this District:

1 COVID-19 is largely spread through person-to-person contact via
2 respiratory droplets from an infected person. The virus spreads
3 “very easily and sustainably between people,” and can be spread by
4 people who are asymptomatic, and from contact with contaminated
5 surfaces. Current studies predict that, depending on the material, the
6 virus can survive on untreated surfaces for between three hours to
7 three days. People with certain underlying health conditions and the
8 elderly are known to be particularly at risk for medical
9 complications related to the disease.

10 *Bent v. Barr*, No. 19-cv-06123-DMR, 2020 WL 1812850, at *1 (N.D. Cal. Apr. 9, 2020)
11 (footnotes omitted).

12 **II. LEGAL STANDARD**

13 A TRO preserves the status quo and prevents irreparable harm until a hearing can be held
14 on an application for preliminary injunction. *Granny Goose Foods, Inc. v. Bhd. of Teamsters &*
15 *Auto Truck Drivers*, 415 U.S. 423, 439 (1974). A request for a TRO is evaluated by the same
16 factors that generally apply to a preliminary injunction, *see Stuhlbarg Int'l Sales Co. v. John D.*
17 *Brushy & Co.*, 240 F.3d 832, 839 n. 7 (9th Cir. 2001), and as a form of preliminary injunctive
18 relief, a TRO is an “extraordinary remedy” that is “never awarded as of right.” *Winter v. Natural*
19 *Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). Rather, the moving party bears the burden of
20 demonstrating that “he is likely to succeed on the merits, that he is likely to suffer irreparable harm
21 in the absence of preliminary relief, that the balance of equities tips in his favor, and that an
22 injunction is in the public interest.” *Winter*, 555 U.S. at 20. Alternatively, if the moving party can
23 demonstrate the requisite likelihood of irreparable harm, and show that an injunction is in the
24 public interest, a preliminary injunction may issue so long as there are serious questions going to
25 the merits and the balance of hardships tips sharply in the moving party’s favor. *Alliance for Wild*
26 *Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Thus, a TRO may be appropriate when a
27 movant raises “serious questions going to the merits” of the case and the “balance of hardships
28 tips sharply in the plaintiff’s favor,” provided that the other elements for relief also are satisfied.
Id. at 1134-35.

29 **III. DISCUSSION**

30 In his habeas petition, Mr. Singh asserts two separate constitutional claims. First, he
31 argues that prolonged detention without a constitutionally compliant bond hearing violates his
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1 procedural due process rights under the Fifth Amendment. Second, he contends that the
2 conditions of his confinement heighten his risk of exposure to COVID-19 and violate his
3 substantive due process rights under the Fifth Amendment. Dkt. No. 1. As discussed, in the
4 present motion for TRO, he seeks immediate release pending the Court's review of his habeas
5 petition and seeks to preserve the status quo with respect to his health, contending that he meets
6 the criteria for immediate injunctive relief as to both of his claims for relief. Dkt. Nos. 2, 3.
7 Respondents argue that Mr. Singh's motion for TRO must be denied because he does not have
8 standing to bring this action; has not exhausted his administrative remedies; and cannot
9 demonstrate that he is likely to succeed on the merits of his claims.

10 **A. Standing**

11 Preliminarily, respondents contend that Mr. Singh lacks standing to bring the present
12 action, but they challenge his standing only with respect to his second claim for relief based on
13 COVID-19.⁵ Here, respondents argue that they have not been indifferent to the risks presented by
14 COVID-19, and that officials at both Mesa Verde and FDC Honolulu have taken significant
15 precautionary steps to protect the health and well-being of detainees at these facilities and prevent
16 an outbreak of the virus. Respondents report the efforts that staff at both facilities are making with
17 respect to sanitization and restrictions on social visitation, as well as screening, testing, and
18 isolating detainees. Dkt. Nos. 12-1, 17. Respondents also note that there currently is no evidence
19 of any confirmed cases of COVID-19 at either Mesa Verde or FDC Honolulu. Dkt. No. 12-1 ¶ 23;
20 Dkt. No. 17 ¶ 17. As such, respondents contend that Mr. Singh's alleged "injury in fact" is based
21 on a mere abstract concern that he may be exposed to COVID-19 while in detention, and that such
22 speculative concerns do not establish a "particularized" or "concrete" injury sufficient to confer
23 standing.

24 Under Article III of the United States Constitution, federal courts have jurisdiction to
25 decide only actual "Cases" or "Controversies," U.S. Const., art. III, § 2, and Mr. Singh has
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⁵ Although respondents contend that Mr. Singh's first claim based on prolonged detention and a
28 constitutionally sufficient bond hearing are not at issue, his TRO motion clearly is based on both
claims for relief.

1 standing to sue if he “(1) suffered an injury in fact, (2) that is fairly traceable to the challenged
2 conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.”
3 *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016); *see also Lujan v. Defenders of Wildlife*, 504
4 U.S. 555, 560-61 (1992). Mr. Singh’s claimed injury must be both “particularized” and
5 “concrete.” A “particularized” injury is one that “affect[s] the plaintiff in a personal and
6 individual way.” *Spokeo, Inc.*, 136 S. Ct. at 1548 (quoting *Lujan*, 504 U.S. at 560 n.1). A
7 “concrete” injury “must actually exist” and must be “real, and not abstract.” *Id.* To assert a
8 “concrete” injury, a plaintiff cannot simply “allege a bare procedural violation, divorced from any
9 concrete harm, and satisfy the injury-in-fact requirement of Article III.” *Id.* at 1549.

10 Mr. Singh has submitted an uncontested statement from Dr. Robert Greifinger, M.D., a
11 physician who attests that he has worked in health care for prisoners and detainees for more than
12 30 years, and who opines about the serious risks concerning COVID-19 in jails, prisons, and
13 detention centers. Dkt. No. 1-19. Indeed, the growing consensus among courts is that the risks of
14 COVID-19 are serious, even without a confirmed case of the virus at the particular facility where a
15 petitioner is detained, and that detainees have standing to bring claims that the conditions of their
16 confinement put them at risk of contracting the disease. *See Perez v. Wolf*, No. 5:19-cv-05191-
17 EJD, 2020 WL 1865303, at *12 (N.D. Cal. Apr. 14, 2020) (“The mere fact that no cases have been
18 reported in the Aurora Facility is irrelevant—it is not a matter of *if* COVID-19 will enter the
19 facility, but *when* it will be detected there.”) (citing cases); *Doe v. Barr*, No. 20-cv-02141-LB,
20 2020 WL 1820667, at *8 (N.D. Cal. Apr. 12, 2020) (same) (citing cases); *Bent*, 2020 WL
21 1812850, at *3 (same); *Ortuno*, 2020 WL 1701724 at *2. At least one court has observed that
22 without evidence that detainees are able to meaningfully practice social distancing, “the structure
23 of detention facilities, which are designed to house multiple people in close proximity, render any
24 sanitation efforts somewhat meaningless as detainees cannot social distance. This is problematic
25 because social distancing is regarded by many as one of the most important steps of stopping the
26 spread.” *Perez*, 2020 WL 1865303 at *12. There is no evidence that Mr. Singh is able to
27 meaningfully practice social distancing at Mesa Verde. Accordingly, this Court finds that Mr.
28 Singh has raised more than a speculative concern and that he has standing to assert his claim that

1 the conditions of his confinement subject him to a heightened risk of being exposed to COVID-19.

2 **B. Exhaustion of Administrative Remedies**

3 With respect to his procedural due process claim based on his continued detention
4 following his recent bond hearing, respondents contend that Mr. Singh's motion for TRO should
5 be denied because he seeks to bypass the administrative review process and has not exhausted his
6 administrative remedies. Mr. Singh does not dispute that his appeal regarding the IJ's denial of
7 bond remains pending before the BIA. Nevertheless, he contends that under the circumstances
8 presented here, the exhaustion requirement should be waived.

9 "The exhaustion requirement is prudential, rather than jurisdictional, for habeas claims."
10 *Hernandez v. Sessions*, 872 F.3d 976, 988 (9th Cir. 2017). Although 28 U.S.C. § 2241, the statute
11 under which Mr. Singh filed his habeas petition, "does not specifically require petitioners to
12 exhaust direct appeals before filing petitions for habeas corpus," as a prudential matter, petitioners
13 are required to exhaust available administrative remedies before seeking relief under § 2241.
14 *Laing v. Ashcroft*, 370 F.3d 994, 997 (9th Cir. 2004) (internal quotations and citation omitted).
15 "Although courts have discretion to waive the exhaustion requirement when it is prudentially
16 required, this discretion is not unfettered." *Id.* at 998. "Lower courts are, thus, not free to address
17 the underlying merits without first determining the exhaustion requirement has been satisfied or
18 properly waived." *Id.*

19 Courts may require prudential exhaustion when:

20 (1) agency expertise makes agency consideration necessary to
21 generate a proper record and reach a proper decision; (2) relaxation
22 of the requirement would encourage the deliberate bypass of the
23 administrative scheme; and (3) administrative review is likely to
allow the agency to correct its own mistakes and to preclude the
need for judicial review.

24 *Hernandez*, 872 F.3d at 988 (citing *Puga v. Chertoff*, 488 F.3d 812, 815 (9th Cir. 2007)).

25 Ordinarily, where a petitioner fails to prudentially exhaust required administrative remedies, the
26 district court should either dismiss the petition without prejudice or stay the proceedings until the
27 petitioner has exhausted remedies. *Id.* "Nonetheless, even if the three *Puga* factors weigh in favor
28 of prudential exhaustion, a court may waive the prudential exhaustion requirement if

1 ‘administrative remedies are inadequate or not efficacious, pursuit of administrative remedies
2 would be a futile gesture, irreparable injury will result, or the administrative proceedings would be
3 void.’’’ *Id.* (quoting *Laing*, 370 F.3d at 1000). Mr. Singh argues that the Court should waive the
4 prudential exhaustion requirements here. Dkt. No. 13.

5 Mr. Singh must show that at least one of the *Laing* waiver considerations applies in order
6 for the Court to excuse his compliance with prudential exhaustion requirements. *See Perez*, 2020
7 WL 1865303 at *6 (citing *Ortega-Rangel v. Sessions*, 313 F. Supp. 3d 993, 1003 (N.D. Cal.
8 2018)). He has done so here by demonstrating futility and irreparable harm. Insofar as Mr. Singh
9 challenges the constitutionality of 8 U.S.C. § 1226(c) as applied in his case, such constitutional
10 challenges exceed the jurisdiction of the BIA. *See Garcia-Ramirez v. Gonzales*, 423 F.3d 935,
11 938 (9th Cir. 2005) (“Because the BIA does not have jurisdiction to resolve constitutional
12 challenges, however, due process claims—other than those alleging only ‘procedural errors’
13 within the BIA’s power to redress—are exempt from this administrative exhaustion
14 requirement.”); *Doe*, 2020 WL 1820667 at *8 (concluding that waiver of the exhaustion
15 requirement was required where “the petitioner’s claim of entitlement to a bond hearing is based
16 on the Fifth Amendment (as opposed to being grounded in a statutory entitlement), and thus
17 exceeds the jurisdiction of the immigration courts and the BIA.”). Moreover, while respondents
18 note that appeals from detained individuals such as Mr. Singh are given priority, *see* 8 C.F.R.
19 § 1003.1(e)(8), they also acknowledge that there is no deadline by which the BIA must decide his
20 appeal. Dkt. No. 12 at 14. Although the record demonstrates that the government is not
21 responsible for all of the delay in his administrative proceedings, the fact remains that he has now
22 been detained for about 20 months. Mr. Singh has received a bond hearing, but claims that he was
23 denied due process in connection with that hearing. In view of the length of Mr. Singh’s detention
24 and the uncertainty regarding the BIA’s future resolution of his appeal, waiver of the
25 administrative exhaustion is appropriate. *See Birru v. Barr*, No. 5:20-cv-01285-LHK, 2020 WL
26 1899408 at *4 (N.D. Cal. Apr. 16, 2020); *Perez*, 2020 WL 1865303 at *6.

1 **C. Entitlement to a TRO**2 **1. Likelihood of Success on the Merits**3 **a. Procedural Due Process Claim**

4 As discussed above, Mr. Singh contends that he has been detained for a prolonged period
5 and that his prolonged detention without a constitutionally compliant bond hearing violates his
6 procedural due process rights under the Fifth Amendment. First, Mr. Singh contends that the IJ
7 erred in concluding that *Casas-Castrillon v. Dep’t of Homeland Sec.*, 535 F.3d 942 (9th Cir. 2008)
8 is no longer good law and that she therefore erroneously concluded that she lacked jurisdiction to
9 grant his request for release on bond. Second, Mr. Singh contends that the IJ applied the wrong
10 legal standard and failed to consider evidence in her alternate holding that DHS met its burden to
11 establish that he presents a danger to the community.

12 **i. *Casas-Castrillon***

13 In essence, the parties dispute the current statutory authority for Mr. Singh’s detention.
14 There are several different provisions of the INA that authorize the government to detain
15 noncitizens during immigration proceedings. *See* 8 U.S.C. §§ 1225(b), 1226(a), 1226(c), and
16 1231(a). “These statutes are different textually and in their application,” and “apply at different
17 stages of an alien’s detention.” *Aleman Gonzalez v. Barr*, — F.3d —, No. 18-16465, 2020 WL
18 1684034, at *3 (9th Cir. Apr. 7, 2020) (internal quotations and citation omitted). “Where an alien
19 falls within this statutory scheme can affect whether his detention is mandatory or discretionary, as
20 well as the kind of review process available to him if he wishes to contest the necessity of his
21 detention.” *Prieto-Romero v. Clark*, 534 F.3d 1053, 1057 (9th Cir. 2008); *see also Aleman*
22 *Gonzalez*, 2020 WL 1684034, at *3 (same).

23 Relevant to the issues presented in Mr. Singh’s habeas petition, detention under § 1226(a)
24 is discretionary, and a detainee held pursuant to that provision is entitled to a bond hearing and
25 may be released if the IJ determines that the detainee would not pose a danger to property or
26 persons and is likely to appear at any future proceeding. *See Birru*, 2020 WL 1899408 at *5. By
27 contrast, detention under § 1226(c) is mandatory and allows for release only for witness protection
28 purposes. *Id.* Detainees held pursuant to this statutory provision generally do not have the

1 opportunity to apply for release on bond or parole. *Id.*

2 Although the parties do not dispute that Mr. Singh initially was detained by ICE pursuant
3 to § 1226(c), they disagree whether his detention continues pursuant to § 1226(c) or whether the
4 authority for his detention has shifted to § 1226(a). Mr. Singh contends that because the BIA
5 dismissed his appeal of the IJ's removal order, and because his petition for review of the removal
6 order is pending before the Ninth Circuit, authority for his detention has shifted to § 1226(a)
7 pursuant to *Casas-Castrillon v. Dep't of Homeland Sec.*, 535 F.3d 942 (9th Cir. 2008). In *Casas-*
8 *Castrillon*, the Ninth Circuit held that mandatory detention under § 1226(c) applies for a limited
9 time and authorizes detention of a noncitizen only until the BIA issues a final removal order.
10 *Casas-Castrillon*, 535 F.3d at 948; *see Birru*, 2020 WL 1899408 at *6 (“Indeed, in *Casas-*
11 *Castrillon*, the Ninth Circuit explained that 8 U.S.C. § 1226(c) only authorizes detention of a
12 noncitizen until the BIA issues a final removal order.”). “Thereafter, the Attorney General’s
13 detention authority rests with § 1226(a) until the alien enters his ‘removal period,’ which occurs
14 only after [the Ninth Circuit has] rejected his final petition for review or his time to seek such
15 review expires.” *Casas-Castrillon*, 535 F.3d at 948 (citing *Prieto-Romero*, 534 F.3d at 1064-65).

16 As noted above, in his immigration proceedings, Mr. Singh requested a bond hearing based
17 on *Casas-Castrillon*. Dkt. No. 1-11 at 2-7. The IJ held a hearing and ultimately determined that
18 she lacked jurisdiction to grant release on bond, finding that *Casas-Castrillon* is abrogated by
19 *Jennings v. Rodriguez*, 138 S. Ct. 830 (2018). Dkt. Nos. 1-15, 1-17. Specifically, the IJ noted that
20 *Jennings* rejected the Ninth Circuit’s application of the doctrine of constitutional avoidance when
21 it found that petitioners detained under certain statutes were entitled to periodic bond hearings
22 where the government bears the evidentiary burden. Dkt. No. 1-17 at 3. Mr. Singh maintains that
23 *Casas-Castrillon* remains good law, whereas respondents argue that the IJ correctly ruled that
24 *Casas-Castrillon* does not survive the Supreme Court’s decision in *Jennings*.⁶ Specifically,
25 respondents argue that *Casas-Castrillon* has been abrogated by the conclusion in *Jennings* that

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27 ⁶ For present purposes neither side has addressed whether it is significant that the IJ distinguished
28 *Casas-Castrillon* factually on the ground that the petitioner was a permanent legal resident, but
Mr. Singh has not obtained that status. Dkt. No. 1-17 at 4.

1 “together with § 1226(a), § 1226(c) makes clear that detention of aliens within its scope must
2 continue ‘pending a decision on whether the alien is to be removed from the United States.’” Dkt.
3 No. 12 at 26 (quoting *Jennings*, 138 S. Ct. at 846).

4 *Casas-Castrillon* remains binding upon this Court, unless that decision “is clearly
5 irreconcilable with the reasoning or theory of intervening higher authority.” *Miller v. Gammie*,
6 335 F.3d 889, 893 (9th Cir. 2003). Although the Ninth Circuit has not squarely addressed whether
7 *Jennings* overruled *Casas-Castrillon*’s conclusion regarding when the statutory authority for
8 detention shifts from § 1226(c) to § 1226(a),⁷ at least two courts within this district have
9 concluded persuasively that *Casas-Castrillon* is not clearly irreconcilable with *Jennings*. See
10 *Birru*, 2020 WL 1899408 at *6-*8; *Hernandez Avilez v. Barr*, No. 19-cv-08296-CRB, 2020 WL
11 1704456, at *3 (N.D. Cal. Apr. 8, 2020). Indeed, in *Birru*, the court rejected the very argument
12 that respondents present here, noting that *Jennings* “overruled various aspects of the Ninth
13 Circuit’s interpretation of the [INA]’s detention provisions,” but left intact *Casas-Castrillon*’s
14 conclusion that “that petitioners who are subject to a final removal order and then seek judicial
15 review of that removal order *are no longer within the scope of 28 U.S.C. § 1226(c)*.” *Birru*, 2020
16 WL 1899408 at *7. “Thus, *Casas-Castrillon* and *Jennings* can be readily harmonized insofar as:
17 (1) *Casas-Castrillon* narrowed the scope of noncitizens who are subject to detention under 8
18 U.S.C. § 1226(c); and (2) *Jennings* then explained the statutory consequences for the noncitizens
19 who continue to fall within the scope of 8 U.S.C. § 1226(c).” *Id.*; *see also Hernandez Avilez*, 2020
20 WL 1899408, at *3 (explaining that *Jennings* may reasonably be interpreted “to mean that
21 [§ 1226(a) and § 1226(c)] work together to ensure that a noncitizen remains in custody pending
22 judicial review of a final order of removal, because § 1226(c) applies before the order of removal
23 becomes final, and § 1226(a) applies after the order of removal becomes final. This interpretation
24 is consistent with the holding in *Casas*.”). This Court agrees with the reasoning of *Birru* and

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26 ⁷ In *Aleman Gonzalez*, the Ninth Circuit concluded that *Jennings* left intact a different aspect of
27 *Casas-Castrillon*; namely, *Casas-Castrillon*’s conclusion that bond hearings are statutorily
28 mandated by § 1226(a). But the Ninth Circuit otherwise did not “decide[] what specifically
remains of *Casas-Castrillon*’s statutory holding after *Jennings*.” — F.3d —, 2020 WL 1684034,
at *20 & n.16.

1 *Hernandez Avilez*, and concludes that *Casas-Castrillon* is not clearly irreconcilable with *Jennings*
2 and remains binding upon this Court. Mr. Singh therefore has shown a likelihood of success as to
3 his argument that the IJ erred in concluding otherwise.

4 **ii. Standard of Dangerousness and Denial of Bond**

5 Nevertheless, as discussed above, the IJ also denied Mr. Singh's request for release on
6 bond on an alternate ground. She concluded that DHS met its burden to establish that Mr. Singh
7 presents a danger to the community. Dkt. Nos. 1-15, 1-17. Mr. Singh argues that the IJ
8 improperly placed the burden on him, rather than the government, to establish that he is not a
9 danger to the community; failed to consider the length of time that had passed since his criminal
10 offenses; and failed to consider evidence of intervening changed circumstances. Respondents
11 maintain that the IJ properly placed the burden on the government to establish dangerousness, and
12 correctly considered and explained all of the facts and evidence supporting her decision.
13 Respondents contend that Mr. Singh simply challenges the IJ's discretionary weighing of the
14 evidence, which is beyond the Court's jurisdiction in habeas proceedings.

15 The Court's jurisdiction to review an IJ's decision is limited:

16 The Attorney General's discretionary judgment regarding the
17 application of this section shall not be subject to review. No court
18 may set aside any action or decision by the Attorney General under
this section regarding the detention or release of any alien or the
grant, revocation, or denial of bond or parole.

19 8 U.S.C. § 1226(e). But while “§ 1226(e) restricts jurisdiction in the federal courts in some
20 respects, it does not limit habeas jurisdiction over constitutional claims or questions of law.”
21 *Singh v. Holder*, 638 F.3d 1196, 1202 (9th Cir. 2011). Thus, for example, § 1226(e) precludes
22 review of complaints that an IJ set an excessively high bond amount. *See Prieto-Romero*, 534
23 F.3d at 1067. However, “claims that the discretionary process itself was constitutionally flawed
24 are cognizable in federal court on habeas because they fit comfortably within the scope of
25 § 2241.” *Singh*, 638 F.3d at 1202 (internal quotations and citation omitted).

26 In the present matter, insofar as Mr. Singh argues that the IJ applied the incorrect standard
27 of proof resulting in a violation of due process, he has stated a colorable constitutional claim that
28 is within the Court's jurisdiction to review. *Singh*, 638 F.3d at 1203. Indeed, respondents do not

1 argue otherwise. However, “[t]o the extent that [Mr. Singh] asks the Court to second-guess the
2 IJ’s weighing of the evidence, that claim is directed solely to the IJ’s discretion and is
3 unreviewable.” *Sales v. Johnson*, 323 F.Supp.3d 1131, 1138-39 (N.D. Cal. 2017); *see also Slim v.*
4 *Nielson*, No. 18-cv-02816-DMR, 2018 WL 4110551, at *4 (N.D. Cal. Aug. 29, 2018) (finding that
5 the IJ was within his discretion to give certain evidence greater weight); *Calmo v. Sessions*, No.
6 C17-07124 WHA, 2018 WL 2938628, at *4 (N.D. Cal. June 12, 2018) (“A district judge may not
7 second-guess the immigration judge’s weighing of the evidence.”)

8 The Ninth Circuit has held that “the government must prove by clear and convincing
9 evidence that an alien is a flight risk or a danger to the community to justify denial of bond at a
10 *Casas* hearing.” *Singh*, 638 F.3d at 1203,⁸ *Obregon v. Sessions*, No. 17-cv-01463-WHO, 2017
11 WL 1407889, at *7 (N.D. Cal. Apr. 20, 2017) (“Case law demonstrates that establishing
12 dangerousness by “clear and convincing evidence” is a high burden and must be demonstrated in
13 fact, not in theory.”) (internal quotations and citation omitted). To determine whether a petitioner
14 detained pursuant to § 1226(a) is a flight risk or danger to the community, IJs should look to a
15 number of factors that may include any or all of the following:

16 (1) whether the alien has a fixed address in the United States; (2) the
17 alien’s length of residence in the United States; (3) the alien’s family
18 ties in the United States, and whether they may entitle the alien to
19 reside permanently in the United States in the future; (4) the alien’s
20 employment history; (5) the alien’s record of appearance in court;
21 (6) the alien’s criminal record, including the extensiveness of
22 criminal activity, the recency of such activity, and the seriousness of
23 the offenses; (7) the alien’s history of immigration violations; (8)
24 any attempts by the alien to flee prosecution or otherwise escape
25 from authorities; and (9) the alien’s manner of entry to the United
26 States.

27 *Singh*, 638 F.3d at 1206 n.5 (citation omitted). “Although an alien’s criminal record is surely
28 relevant to a bond assessment,” a detainee’s “criminal history alone will not always be sufficient
to justify denial of bond on the basis of dangerousness. Rather, the recency and severity of the
offenses must be considered.” *Id.* at 1206. Additionally, *Casas-Castrillon* requires

⁸ The Ninth Circuit has confirmed that *Jennings* did not invalidate *Singh*’s holding regarding
constitutional due process burden of proof. *Aleman Gonzalez*, — F.3d —, 2020 WL 1684034 at
*16.

1 “individualized bond hearings to ensure that ‘the government’s purported interest’ in securing the
2 alien’s presence at removal and protecting the community from danger ‘is *actually* served by
3 detention *in [t]his case*,’ necessarily anticipating that criminal history alone would not always
4 justify detention.” *Id.* (quoting *Casas-Castrillon*, 535 F.3d at 949) (alteration in original). Thus,
5 “the gravity of the offense, when the offense occurred, and what the immigrant has done since the
6 offense are all factors the IJ must consider when determining whether the [g]overnment has met its
7 ‘clear and convincing’ burden.” *Perez*, 2020 WL 1865303 at *6.

8 Mr. Singh first contends that the IJ erred by “combin[ing] multiple different standards in
9 her analysis,” noting that she stated she had “broad discretion” to grant or deny bond and also
10 variously stating that the government or Mr. Singh had the burden to regarding dangerousness.
11 Dkt. No. 3 at 23; Dkt. No. 1-17. However, courts have recognized that the Attorney General has
12 broad discretion in deciding whether or not to release an alien on bond. *Ortega-Rangel*, 313 F.
13 Supp. 3d at 1001. The IJ did state in one portion of her decision that a respondent (i.e., petitioner)
14 bears the burden of establishing that he is not a danger to the community (Dkt. No. 1-17 at 4); but
15 aside from that one remark, her decision otherwise consistently states that the government had the
16 burden of proof. *See* Dkt. No. 1-17; *see also* Dkt. No. 1-15. Mr. Singh has not pointed to any
17 other evidence suggesting that the IJ improperly assigned the burden of proof to him. Without
18 more, the Court finds no error here.

19 Mr. Singh nonetheless contends that in denying bond, the IJ focused exclusively, and
20 improperly, on his criminal convictions and his admitted addiction to methamphetamine. Mr.
21 Singh further argues that the IJ failed to consider the passage of time since his last conviction and
22 evidence of changed circumstances, namely that since his latest arrest in 2015, he attended
23 substance abuse programming for the first time and has been clean for five years; had no history of
24 disciplinary action while incarcerated; and has processed his addiction with his family. *See, e.g.*,
25 Dkt. No. 1-6 at 13-17, 20, 23, 56-57; Dkt. No. 1-10 at 56.

26 In denying bond, the IJ did base her decision, in part, on Mr. Singh’s criminal convictions.
27 She noted that “[i]n the last ten years, [Mr. Singh] has been convicted of four offenses and spent
28 multiple years in jail or prison.” Dkt. No. 1-17 at 5. The IJ further noted that Mr. Singh’s

1 offenses, which include DUI, weapons, robbery and vehicle theft offenses, occurred between 2011
2 and 2015 and “involve[d] an element of danger to either the people or property [of] the United
3 States.” *Id.* Contrary to Mr. Singh’s arguments, however, the IJ also considered both the passage
4 of time since Mr. Singh’s latest conviction and his efforts at rehabilitation. Here, the IJ
5 acknowledged Mr. Singh’s claims that after his 2015 arrest, “he has since become sober and
6 attended treatment and rehabilitation classes while in custody,” and further noted that “his efforts
7 are well-documented.” Dkt. No. 1-17 at 5. Additionally, the IJ “also recognize[d] that [Mr.
8 Singh] has worked with a social worker to create a release plan and has a deep desire to be present
9 for his family.” *Id.* Nevertheless, the IJ remarked that because “[Mr. Singh] has been in custody
10 continuously since 2015,” she “[could not] find that these efforts are sufficient to outweigh the
11 serious and dangerous nature of [Mr. Singh]’s criminal history prior to his incarceration.” *Id.*
12 Although the IJ did not specifically mention each piece of evidence submitted, that “does not
13 overcome the presumption that the IJ satisfied the due process requirement to consider such
14 evidence.” *Perez*, 2020 WL 1865303 at *9 (citing *Larita Martinez v. Immigration &*
15 *Naturalization Serv.*, 20 F.3d 1092, 1096 (9th Cir. 2000)); *see also Cole v. Holder*, 659 F.3d 762,
16 771 (9th Cir. 2011) (“That is not to say that [the IJ] must discuss each piece of evidence
17 submitted. When nothing in the record or the [IJ’s] decision indicates a failure to consider all the
18 evidence, a general statement that [the IJ] considered all the evidence . . . may be sufficient.”).
19 Here, the IJ stated that she “considered all factors and evidence in [Mr. Singh]’s bond record,” and
20 there is no potentially dispositive evidence that required further discussion. *Perez*, 2020 WL
21 1865303 at *10. Moreover, to the extent Mr. Singh argues that he is entitled to relief because the
22 IJ improperly gave more weight to his criminal history than to subsequent events, for the reasons
23 discussed above, this Court does not have jurisdiction to review such matters in habeas corpus
24 proceedings.

25 Accordingly, the Court concludes that for purposes of Mr. Singh’s present motion for
26 TRO, he has not established a likelihood of success on the merits as to his procedural due process
27 claim. As such, the remainder of this order concerns only Mr. Singh’s substantive due process
28 claim based on the COVID-19 pandemic.

b. Substantive Due Process Claim

In view of the COVID-19 pandemic, and claiming that he has conditions that heighten his risk of complications or death from the virus, Mr. Singh argues that his conditions of confinement pose a serious health risk that violates his Fifth Amendment substantive due process rights. He requests that the Court grant a TRO directing his immediate release pending the Court's review of his habeas petition. If released, Mr. Singh indicates that he plans to shelter-in-place with his parents in Sacramento.

The Fifth Amendment requires that civil detainees, such as Mr. Singh, “cannot be subjected to conditions that ‘amount to punishment.’” *Bent*, 2020 WL 1812850 at *4 (quoting *Jones v. Blanas*, 393 F.3d 918, 932 (9th Cir. 2004)); *see also Bell v. Wolfish*, 441 U.S. 520, 535 (1979) (“In evaluating the constitutionality of conditions or restrictions of pretrial detention that implicate only the protection against deprivation of liberty without due process of law, we think that the proper inquiry is whether those conditions amount to punishment of the detainee.”). “Accordingly, ‘civilly detained persons must be afforded more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.’” *Bent*, 2020 WL 1812850 at *4 (quoting *Padilla v. Yoo*, 678 F.3d 748, 759 (9th Cir. 2012)). “In the absence of evidence of express intent, a court may infer that the purpose of a particular restriction or condition is punishment if the restriction or condition is not reasonably related to a legitimate governmental objective or is excessive in relation to the legitimate governmental objective.” *Id.* (internal quotations and citation omitted).

Here, the issue presented is whether Mr. Singh is likely to show that, in view of his claimed health conditions, his detention is excessive in relation to the government’s needs. Courts have concluded that this requirement is satisfied where a detainee demonstrates that he has health conditions that put him at high risk of severe illness if infected with COVID-19. *See, e.g., Perez*, 2020 WL 1865303 at *13 (concluding that the petitioner showed a likelihood of success on the merits where medical records substantiated that he suffers from asthma, hypertension, and latent tuberculosis); *Doe*, 2020 WL 1820667 at *9 (finding a likelihood of success on the merits where records evidenced the petitioner’s diagnoses of chronic post-traumatic stress disorder and

1 depression that compound his susceptibility to COVID-19); *Bent*, 2020 WL 1812850 at *6
2 (finding irreparable harm where petitioner's medical records demonstrated that he suffered from
3 hypertension and asthma). *Cf. Ortuno*, 2020 WL 1701724 at *3 (denying motion for TRO for
4 certain petitioners where the record lacked evidence clearly demonstrating a medical condition
5 that placed any of them at a higher risk for severe illness from COVID-19).

6 Mr. Singh contends that he has been diagnosed with high blood pressure, has a history of
7 smoking, is obese, and has latent tuberculosis. *See* Dkt. Nos. 1 ¶ 9; Dkt. No. 1-18 ¶ 16; Dkt. No.
8 22 ¶ 29. He does not, however, refute respondents' evidence that he does not have "extreme
9 obesity" (i.e., a body mass index of 40 or higher) or that the CDC only lists persons who suffer
10 from "extreme obesity" as being at higher risk. Dkt. No. 17 ¶ 16;
11 <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html>.
12 Respondents also correctly note that Mr. Singh has not presented any medical evidence
13 corroborating his claimed medical conditions,⁹ and Mr. Singh acknowledges that a supplemental
14 declaration submitted by his attorney contains hearsay. Dkt. No. 20. Courts nonetheless have
15 credited hearsay where doing so serves the purpose of avoiding irreparable harm before trial. *See*
16 *Ortuno*, 2020 WL 1701724 at *3 n.3.

17 In any event, respondents do not refute Mr. Singh's assertion, made through his counsel's
18 declaration, that while at Mesa Verde he was diagnosed with high blood pressure and prescribed
19 Lisinopril. Dkt. No. 1-18 ¶ 16. Instead, they contend that the CDC's website does not list
20 hypertension as a high-risk criterion for COVID-19. Dkt. No. 17 ¶ 16 (citing
21 <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html>).
22 However, as noted by Mr. Singh and by another court in this District, "another page of the same
23 website does include persons with hypertension in that higher-risk group, *see*
24 www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html (listing
25 hypertension as condition 'associated with increased illness severity and adverse outcomes')."
26 *Ortuno v. Jennings*, No. 20-cv-02064-MMC, 2020 WL 1866122 at *1 (N.D. Cal. Apr. 14, 2020);

27
28 ⁹ Mr. Singh's counsel advises that she has had some difficulty in timely obtaining his medical
records from Mesa Verde and FDC Honolulu. *See* Dkt. No. 14 ¶ 4.

1 *see also* Dkt. No. 3 at 14 n.4. Additionally, courts have noted the opinion of Dr. Brie Williams,
2 Professor of Medicine at UCSF with expertise in health issues affecting prisons. *See United States*
3 *v. Daniels*, No. 19-cr-00709-LHK (NC), 2020 WL 1815342, at *3 (N.D. Cal. Apr. 9, 2020) (citing
4 *United States v. McCoy*, Case No. 19-cr-00067-JD, Dkt. No. 94, Ex. 2 (Affidavit of Brie Williams,
5 M.D.) at 3). Dr. Williams states that the CDC recognizes hypertension as a condition that puts
6 individuals at higher risk of severe illness from COVID-19. *McCoy*, Case No. 19-cr-00067-JD,
7 Dkt. No. 94, Ex. 2 (Affidavit of Brie Williams, M.D.) ¶ 16. Moreover, for the reasons discussed
8 above, there is no clear indication that Mr. Singh is able to meaningfully practice social distancing
9 or take other preventive measures in detention. While the government has a non-punitive and
10 legitimate purpose in detaining Mr. Singh, e.g., to protect the public and ensure his appearance at
11 legal proceedings, Mr. Singh has shown that his conditions of confinement pose a serious health
12 risk that violates his Fifth Amendment substantive due process rights.

13 2. Irreparable Harm

14 While conclusory or speculative allegations of harm are insufficient to establish that Mr.
15 Singh will suffer irreparable harm, for the reasons discussed above, Mr. Singh's allegations of
16 harm are not speculative or conclusory. The Court concludes that he has shown that irreparable
17 harm is likely absent a TRO.

18 3. Balance of Equities and the Public Interest

19 “Where the Government is the opposing party, the final two factors in the temporary
20 restraining order analysis—the balance of the equities and the public interest—merge.” *Bent*,
21 2020 WL 1812850 at *7 (internal quotations and citation omitted). Respondents have a legitimate
22 interest in preventing danger to the community. “However, courts have recognized the shifting
23 nature of these interests in light of the COVID-19 pandemic,” and “that any risk a detainee poses
24 to the community requires considering all factors, including the substantial medical and security
25 challenges [that] would almost certainly arise in the event of a COVID-19 outbreak in a prison or
26 detention facility.” *Id.* (quoting *United States v. Stephens*, No. 15-cr-95 (AJN), 2020 WL
27 1295155, at *2 (S.D.N.Y. Mar. 19, 2020)); *see also Perez*, 2020 WL 1865303 at *13 (“Moreover,
28 the public interest in promoting public health is served by efforts to contain the further spread of

1 COVID-19, particularly in detention centers, which are typically staffed by persons who reside in
2 the local communities.”). Additionally, under the particular circumstances presented here, the
3 Court finds that respondents’ concerns can be addressed by releasing Mr. Singh for a temporary
4 period to coincide with California’s shelter-in-place order, and by imposing reasonable conditions
5 of release, which the Court anticipates will include at least the following:

- 6 1. Mr. Singh shall reside and shelter in place at an address (to be specified in the order
7 setting conditions of release), and he must obey all governmental shelter-in-place
8 orders, regulations and protocols.
- 9 2. Mr. Singh shall be transported by a person (to be specified in the order setting
10 conditions of release), from his place of detention to the residence where he will
11 reside and shelter in place.
- 12 3. Pending further order of the Court, Mr. Singh shall not leave the residence where
13 he will shelter in place, except to obtain medical care, to appear at immigration
14 court proceedings, or to obey any order issued by DHS.
- 15 4. Mr. Singh shall not consume any alcoholic beverages or use or possess any narcotic
16 or other controlled substance without a legal prescription.
- 17 5. Mr. Singh shall not possess any firearm, destructive device, or other dangerous
18 weapon.
- 19 6. Mr. Singh shall not violate any federal, state, or local law.

20 **IV. CONCLUSION**

21 Based on the foregoing, Mr. Singh’s motion for TRO is granted in part as follows:

- 22 1. Mr. Singh shall be released upon issuance of an order setting conditions of release.
23 The parties’ respective counsel shall confer forthwith and propose, in a joint
24 statement to be filed no later than **noon on April 22, 2020**, any additional
25 reasonable conditions of release.
- 26 2. Additionally, the parties’ respective counsel shall confer and propose, in the joint
27 statement to be filed no later than **noon on April 22, 2020**, a date upon which Mr.
28 Singh will return to ICE custody. For example, this date could be set to coincide

1 with the expiration of California's shelter-in-place order.

2 3. This TRO will expire on **May 4, 2020**, unless the parties are able to stipulate to a
3 different date upon which Mr. Singh will return to ICE custody. If the parties are
4 unable to stipulate to a date upon which Mr. Singh will return to ICE custody, no
5 later than **noon on April 27, 2020**, respondents shall show cause why the TRO
6 should not be converted into a preliminary injunction for the duration of
7 California's shelter-in-place order.

8 **IT IS SO ORDERED.**

9 Dated: April 20, 2020

10 
11 VIRGINIA K. DEMARCHI
12 United States Magistrate Judge